

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA)	
)	Criminal No.: 3:00-CR-400-P
v.)	
)	Judge Jorge A. Solis
MARTIN NEWS AGENCY, INC.; and)	
BENNETT T. MARTIN,)	
)	FILED: April 30, 2001
Defendants.)	

RESPONSE OF THE UNITED STATES IN OPPOSITION TO
DEFENDANTS' JOINT MOTION FOR EXTENSION OF TIME TO FILE
PRETRIAL MOTION RE: STATUTE OF LIMITATIONS VIOLATION

I
INTRODUCTION

The defendants have filed a *Motion for Extension of Time to File Pretrial Motion Re: Statute of Limitations Violation* ("Motion") asking this Court for additional time to file a motion to dismiss based upon Statute of Limitations grounds. Pursuant to this Court's Order rescheduling the trial, defendants' pre-trial motions were required to be filed no later than April 16, 2001. The defendants have requested an additional three weeks, until May 7, 2001, to file a pre-trial motion to dismiss. The defendants state that they need this additional time to gather evidence and interview witnesses to support their argument that defendants withdrew from the charged conspiracy outside of the statute of limitations period. They also request a hearing on the proposed motion.

The defendants have had ample time to gather evidence relating to the affirmative defense of withdrawal from the conspiracy. The April 16 deadline for defendants' pre-trial motions was more than six months since defendants were indicted, and more than two months since the United

States made Rule 16 materials available to defendants in Dallas. Furthermore, defendants' proposed motion to dismiss, based on their allegedly withdrawing from the conspiracy in the statute of limitations period, should not be considered pre-trial under Rule 12 of the Federal Rules of Criminal Procedure because the issue cannot be determined without a trial of the general issue.

Accordingly, the United States requests that this Court deny defendants' Motion.

II
DEFENDANTS HAVE HAD SUFFICIENT TIME
TO PREPARE AND FILE ALL PRETRIAL MOTIONS

A. DEFENDANTS HAVE HAD MORE THAN SIX MONTHS
SINCE THE INDICTMENT TO GATHER EVIDENCE
RELATED TO A STATUTE OF LIMITATIONS ARGUMENT

The defendants have had more than six months since they were indicted on October 5, 2000, to interview witnesses and gather evidence relating to the statute of limitations. In their motion, defendants point out that the indictment defines the conspiracy as “[b]eginning at least as early as August 1990, and continuing at least through October 30, 1995, the exact dates being unknown to the Grand Jury.” The defendants could and should have started to explore a statute of limitations defense at least by early October, when they had notice that the grand jury had returned the indictment.

B. DEFENDANTS HAVE HAD ALMOST THREE MONTHS
TO GATHER EVIDENCE FROM RULE 16 MATERIALS

1. Defendants Have Already Been Granted Additional Time To
Gather Evidence For Their Defense And To File Their Pre-trial Motions

The original Pre-trial Scheduling Order set this case for trial beginning December 18, 2000, and required defendants' pre-trial motions to be filed by November 1, 2000. On November 28, 2000, this Court granted defendants' unopposed motion to amend that order, and entered an Order

setting the trial date for May 14, 2001, requiring defendants to file their pre-trial motions by March 16, 2001. In accordance with the amended pre-trial scheduling order, the United States shipped all Rule 16 materials to Dallas for defendants' review. Eighty-two boxes were made available to the defendants in Dallas on January 22, 2001; the remaining Rule 16 materials, approximately thirty-two boxes, were made available in Dallas on February 12, 2001. Based on the number of Rule 16 documents produced, on March 7, 2001, the defendants filed a motion to delay the trial date again. This Court entered an Order on April 5, 2001, granting defendants' motion and setting the trial date for July 9, 2001. The Order also required the the defendants' pre-trial motions to be filed no later than April 16, 2001. Thus, in addition to the initial extension of almost five months, the defendants have been given an additional month to prepare their pre-trial motions in response to their claim that they needed more time to review documents.

2. Defendants Had Sufficient Time To Prepare A Motion To Dismiss With Supporting Evidence By The April 16, 2001 Deadline

The defendants assert in their Motion that they have already compiled documentary evidence from Rule 16 materials, but need additional time to locate and interview witnesses, and obtain affidavits. The defendants offer no explanation as to why they were unable to obtain affidavits from witnesses prior to the April 16 deadline.

Despite the large number of Rule 16 materials, the defendants have had more than enough time to review the documents, track down leads, and locate and interview potential witnesses. Almost three months have passed between the time the defendants had access to the bulk of the Rule 16 materials in Dallas and April 16, when the defendants' pre-trial motions were due. Between the time the defendants filed their motion to delay the trial date, on March 7, 2001, and

filed on April 16 this motion for an extension of time to file a motion to dismiss, the defendants spent a negligible two hours reviewing Rule 16 documents. That was on March 9, 2001.

Therefore, even assuming that the defendants discovered names of potential witnesses only after reviewing Rule 16 materials -- and could not have discovered them earlier in preparing a withdrawal defense -- the defendants would have had that information by March 9. In other words, they would have had at least five weeks, from the last time they reviewed documents until the date their pre-trial motions were due, to locate those witnesses, interview them, and obtain affidavits in support of a motion to dismiss. The defendants have articulated no reason why they could not have gathered this evidence by the April 16 deadline imposed by this Court for their pre-trial motions. Consequently, Court should deny defendants' third request for a delay to file this pre-trial motion.

III DEFENDANTS ARE NOT ENTITLED TO A PRETRIAL DETERMINATION OF THE WITHDRAWAL ISSUE

The defendants' Motion also should be denied because, even if they file a motion to dismiss based on a withdrawal from the conspiracy, resolution of that issue cannot be determined before trial. Apparently, the defendants believe that the government may have missed the statute of limitations. But a motion to dismiss on these grounds is *not* "capable of determination without the trial of the general issue" under Rule 12(b) of the Federal Rules of Criminal Procedure. The defendants offer no cases in support of a pre-trial determination of that issue on a motion to dismiss. To the contrary, courts have generally denied pre-trial motions to dismiss based on a defendant's argument that they withdrew from a conspiracy, finding that whether defendants withdrew from the conspiracy depends on issues of facts that should be resolved by the jury. See,

e.g., United States v. Berger, 22 F. Supp. 2d 145, 154 (S.D. N.Y. 1998); United States v. Levine, 905 F. Supp. 1025, 1033 (M.D. Fla. 1995).

A. DEFENDANTS' CITED CASES DO NOT CALL FOR A
PRE-TRIAL DETERMINATION OF THE WITHDRAWAL ISSUE

Two of the cases cited by the defendants deal with the withdrawal issue at trial. The first, Gypsum, dealt with defective jury instructions. In Gypsum, the Court held that the trial judge erred in charging the jury that a defendant could withdraw from a conspiracy only by affirmatively notifying each other member of his withdraw, or by disclosing the conspiracy to law enforcement officials. Gypsum at 463-64. The defendants also rely on United States v. Nippon Paper Industries Co., 62 F. Supp. 2d 173 (D. Mass. 1999). In that case, the Court granted the defendants' motion for judgment of acquittal, based in part on finding that the defendant met its burden of showing that it withdrew from the conspiracy, placing the charged conspiracy outside of the statute of limitations period. Nippon Paper at 192.

The defendants also cite an Eighth Circuit opinion in which the court remanded the case for reconsideration on the statute of limitations issue. United States v. Grimmer, 150 F.3d 958 (8th Cir. 1998). The trial judge had denied the defendant's motion to dismiss and request for an evidentiary hearing on the statute of limitations issue. The Court of Appeals did *not* hold that the judge should have held a pretrial evidentiary hearing on the motion to dismiss. Rather, the Court held that if there were disputed factual issues relating to the alleged withdrawal and inevitably tied to the evidence of the alleged offense, then the Court should defer ruling on the motion until trial.

B. THE WITHDRAWAL ISSUE SHOULD BE
DEFERRED UNTIL TRIAL AND DETERMINED BY THE JURY

If the government establishes that the defendants knowingly entered into an agreement in

violation of § 1 of the Sherman Act, the conspiracy is presumed to continue unless the defendants affirmatively show otherwise. United States v. Hayter Oil Co., 51 F.3d 1265, 1270 (6th Cir. 1995). The defendants have the burden of establishing they withdrew from the conspiracy by showing “affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators.” United States v. United States Gypsum Co., 438 U.S. 422, 464-65 (1978). Whether the defendants withdrew from the conspiracy is “a matter for the jury to decide in the context of the entire case.” United States v. Jimenez, 622 F.2d 753, 756 (5th Cir. 1980); United States v. Berger, 22 F. Supp. 2d 145, 154 (S.D. N.Y. 1998) (“A properly instructed jury will decide whether [defendant] withdrew from the conspiracy . . . prior to the statute of limitations period”). The defendants concede as much in their motion by stating that the jury is to consider acts of withdrawal. Motion, p. 3.

Furthermore, the defendants’ proposed motion falls within that portion of Rule 12(b) of the Federal Rules of Criminal Procedure which provides that a defense may be raised by a pre-trial motion if it is “capable of determination without the trial of the general issue.” Generally, there are disputed issues relating to an alleged withdrawal that cannot be determined without a trial of the general issue. See, e.g., United States v. Levine, 905 F. Supp. 1025, 1033 (M.D. Fla. 1995); United States v. Stone, 444 F. Supp 1254, 1256 (E.D. Wis. 1978); United States v. Tolub, 187 F. Supp. 705,709 (S.D. N.Y. 1960). As one Court stated in considering a motion to dismiss

on these grounds:

At the very best the issue of withdrawal has been prematurely raised. It relates to an affirmative defense . . . rather than to any omission or defect on the fact of the indictment. In order to

prevail, the defendant would have to rely on facts that either are not a part of the record or could properly come before the court for consideration only at trial when the time came for it to present its defense. Thus, . . . this would be neither the time nor the forum in which to seek a determination that its renewal of competitive activity entitled it to dismissal of the indictment without trial or other proceedings.

United States v. General Box Co., 1989 WL 92035 (N.D. Ohio 1989) (quoting and adopting the Magistrate's Report and Recommendation)(see attached).

Although the defendants have not yet set forth any specific facts in support of a withdrawal defense, at trial the United States will offer ample evidence that the charged conspiracy lasted at least through October 25, 1995, the exact dates being unknown to the grand jury. On its face, the indictment in this case alleges a conspiracy that continued into the statute of limitations period. Indictment, p. 1. At trial, the government will prove this through co-conspirator testimony, as well as actions of defendants and others. The general issue for trial is whether the charged conspiracy was in place on October 5, 1995, the date five years preceding the indictment date of October 5, 2000. Accordingly, the United States respectfully requests that this court deny defendants' Motion, and defer consideration of the withdrawal issue until trial if properly raised by the defendants.

IV CONCLUSION

Defendants have already had more than sufficient time to gather evidence and interview witnesses in support of a motion to dismiss. Furthermore, a motion to dismiss on the grounds that defendants withdrew from the conspiracy outside of the statute of limitations period will raise disputed factual issues that are for the jury to determine. Therefore, defendants are seeking

additional time to file a motion that in any event this Court should deny. Accordingly, the United States respectfully requests that this Court deny defendants' Motion.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via Federal Express to the Office of the Clerk of Court on this 27th day of April, 2001. In addition, copies of the above-captioned pleading were served upon the defendants via Federal Express on this 27th day of April 2001.

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